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IN THE
Supreme Court of the United States

JACKIE SANDERS,

Petitioner,

v.

EXXON CORPORATION, d/b/a EXXON COMPANY, U.S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (June 12, 2000), a "pretext plus" case, is applicable to the instant case, which was not decided using that standard. If so, whether *Reeves* could possibly lead to a different result in view of the overwhelming and uncontroverted summary judgment evidence.

CORPORATE DISCLOSURE STATEMENT

Respondent, Exxon Corporation, d/b/a Exxon Company, U.S.A., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioner's Statement of the Case omits so many important and uncontroverted facts as to be misleading. Mindful of its obligations under Rule 15.2, Respondent presents a more complete and balanced Statement of the Case.

Petitioner was a supervisor in Respondent's ("Exxon") Revenue Accounting East (RAE) group, a part of the Controller's Department. Petitioner reported to Gary Schott and was responsible for, among other things, helping management evaluate and "rank" the employees under her supervision. (Pet'r Dep. 27-28, 30; R1/919-8.)[1]

According to Petitioner, in April and June 1995 she expressed concern to Schott that certain minorities under her supervision were being discriminated against in the annual ranking process. (R1/918 ¶¶ 6-11.) Also according to Petitioner, in October 1995, Schott — with discriminatory motives — told her to lower a particular minority employee's evaluation, a directive which she says she refused. (R1/916 ¶ 22.)[2] Petitioner

1. Petitioner's deposition is attached as Ex. 1 to Exxon's Memorandum in Support of its Motion for Summary Judgment ("E-MSJ") at Record Volume 4, p. 353 (R4/353). Because all of Defendant's exhibits were filed under seal and do not have record cites, Defendant will refer to some affidavits and exhibits by name. Record excerpts in the Fifth Circuit are referred to by page/paragraph ("ERE x/y"). Exxon Corporation's Reply to Plaintiff's Response to Exxon's MSJ is referred to as "E-RMSJ." The trial court's decision is referred to as "Opinion" and citations to the Opinion are to the version attached as Appendix A to the Petition.

2. Part of Petitioner's responsibility in the ranking process was to follow company policy in the ranking procedure. Exxon policy requires that, for any employee ranked in the bottom 20% of his or her peer group, the employee's evaluation form must reflect that the employee's performance is "below most" in certain significant areas. This is not an arbitrary requirement, but rather recognition that, where an employee has been ranked below at least 80% of his or her peers, that employee's (Cont'd)

did not express her concerns about Schott to any other Exxon employees at that time. (Opinion at 13a; Pet'r Dep. 123-24, 130, 473-74, 484, 508-09, 563; Templeton Aff. at ERE 16/11.)

Templeton Offers Petitioner a Transfer to UFS

Sheila Templeton was the Manager for RAE; she was Schott's boss and Petitioner's second-level supervisor. Templeton was also a member of the Personnel Subcommittee, the group responsible for transfers and assignments within the Controllers Department. Through that committee, Templeton learned that a position needed to be filled in the Upstream Financial Services ("UFS") group, which reported to David Middlebrooks. Templeton thought Petitioner would be a good "fit" for this job because Petitioner had previously expressed a strong interest in transferring to UFS[3] and also had good analytical skills. Templeton discussed the issue with Middlebrooks and, instructed Schott to offer Petitioner the UFS position. Schott offered her the job in June 1995, but had no other involvement with the transfer. (Pet'r Dep. 132; Templeton Aff. at ERE 14-15/2-3, 5; Schott Aff. ¶ 14 at E-MSJ, Ex. 5; R 1/917.)

(Cont'd)
performance is *by definition* "below most" of the other employees. Despite the fact that two of Petitioner's employees were ranked in the bottom 20%, Petitioner had not marked them "below most" in appropriate areas and had not indicated the performance deficiencies which resulted in the low rankings. One of these employees was white and one was Asian. When Schott asked Petitioner to revise *both* of these evaluations to comply with the policy, Petitioner changed only the white employee's form. She refused to change the Asian employee's form because she had — again, contrary to Exxon policy and her supervisors' directives — already met with the Asian employee and inappropriately given her a positive performance review. (Pet'r Dep. 162-63, 170-72, 174-75; R4/349-348).

3. In fact, on one occasion when another RAE supervisor under Schott, a peer of Petitioner, was transferred to UFS, Petitioner told Schott, "I [want] to go to UFS." Petitioner also testified that UFS was a (Cont'd)

Petitioner declined the offer, stating that frequent overtime and weekend work would interfere with her need to spend weekends in San Antonio caring for her mother. (Pet'r Dep. 133, 209; *see also* E-MSJ, Ex. 8, p.3.) Petitioner seemed genuinely upset at being unable to accept the transfer. (Templeton Aff. at ERE 15/6.) Templeton said she understood Petitioner's personal situation and that she did not have to accept the transfer. (Pet'r Dep. 152-53, 192.) Instead, Jane Beaty (another supervisor under Schott) was moved into the open UFS position. (Pet'r Dep. 269; Templeton Aff. at ERE 15/7.) The transfer of supervisors from RAE to non-supervisory positions in UFS was a common practice and normal progression. (Pet'r Dep. 452-54.)

Templeton Finds Another UFS Position for Petitioner

Templeton remained alert to financial analysis assignments for Petitioner that would not require weekend and overtime work. (Templeton Dep. (Ex. P to E-RMSJ at R1/978) 63, 66.) Around October 1995 another opening came up in UFS, which Middlebrooks brought to Templeton's attention through the Personnel Subcommittee. Templeton told Middlebrooks that she "didn't have any candidates unless they could work something with [Petitioner]." Middlebrooks assured Templeton that the job in question would not require significant overtime or weekend work, and that he "felt very strongly that he could accommodate" Petitioner's need to care for her mother. Believing Petitioner had been disappointed she could not accept the June UFS offer, Templeton "recommended and, as part of the Personnel Subcommittee, approved . . . Petitioner's transfer to UFS."[4] (Templeton Aff. at ERE 16/9; Templeton Dep. 107-08.)

(Cont'd)
prestigious place to work and that it was where Exxon placed employees who were strong performers with high potential. (Pet'r Dep. 52-53.)

4. Templeton had other business reasons for transferring Petitioner, namely that there were conflicts between Petitioner and her subordinates, (Cont'd)

When Templeton told Schott of the transfer, he agreed that it was a good idea. (Schott Aff. ¶ 15 at E-MSJ, Ex. 5.) Templeton instructed Schott to "present it to [Petitioner] and present it as a done deal." (Templeton Dep. 108.) Schott notified Petitioner of the transfer and Petitioner reported to her new job in UFS. Petitioner was assigned exactly the same classification level, salary and performance ranking she enjoyed in RAE. (Pet'r Dep. 478.) Petitioner stated that at the time she considered the UFS job to be a "good opportunity" and that she was "quite happy" with the transfer. (Pet'r Dep. 180-81; *see also* E-MSJ, Ex. 8, p.3.)

Nine Months Later Petitioner Complains About the Transfer

Nine months after her transfer to UFS, in August 1996, Petitioner sought out Templeton. She was "very upset and crying" during this meeting and repeatedly asked Templeton why she had been transferred to UFS. Templeton explained that this had been an opportunity for Petitioner to move into a job in which she had expressed a strong interest, and also accommodate her need to care for her mother, the only reason Petitioner gave for declining the prior offer. (Pet'r Dep. 563-64, 573-75; Templeton Aff. at ERE 17-18/15; Templeton Dep. 133.)

In the meantime, Petitioner's manager, Peggy Brittan, noticed that Petitioner appeared to be overreacting to work issues, blowing small incidents out of proportion, and seemed

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(Templeton Aff. at ERE 16/8; Pet'r Dep. 454-55), and that Petitioner had been in her supervisory job for over three years, which was not a permanent assignment, but rather was rotational in nature. (Templeton Aff. at ERE 16/9; Pet'r Dep. 452-54.) Further, a high-performing employee was returning from family leave and Templeton felt that the she should rotate into Petitioner's spot in RAE. (Templeton Aff. at ERE 16/9; Templeton Dep. 66.)

unable to deal with criticism of her work.[5] Plaintiff testified she kept her door closed and would often cry during business hours. (Pet'r Dep. 418-19, 698-99, 776.) On August 19, 1996, Brittan contacted Liz Lawhorn, a nurse in Exxon's Medical Department, and expressed her concern. Brittan told Lawhorn that Petitioner could be under stress because she "works all week then drives to San Antonio for the weekend to care for her ill mother." Lawhorn suggested that Brittan offer Petitioner a chance to be evaluated by Medical. (Lawhorn Dep. (Ex. N to E-RMSJ at R 1/978) 24-25.)

Petitioner Brings Forward Allegations About Schott

On August 20, 1996, Templeton and Petitioner met again, this time with an HR representative (Jack Hayes) present. Petitioner was extremely upset and asked again why she had been moved to UFS. Templeton again explained the rationale for the move. Petitioner then alleged — for the first time and more than a year after the alleged incidents — that Schott had tried to drop minorities in the rankings and had made racial remarks about minority employees. She also stated that she thought Schott wanted to punish her for refusing to mark the Asian employee "below most" on her evaluation. *See* note 2, *supra*. Lastly, Petitioner told them that she was not enjoying her job in UFS and that she had been making numerous errors there. (Pet'r Dep. 563, 580-83; Templeton Aff. at ERE 18-19/16.) Petitioner's complaints about her job found a sympathetic ear in Templeton, who repeatedly asked Petitioner if she wanted to be assigned to a new position outside of UFS. Petitioner said no. (Pet'r Dep. 510-11, 583-84; Templeton Aff. at ERE 18-19/16.)

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5. Brittan had taken over for Middlebrooks as Manager of UFS. She had been informed by Templeton in August 1996 that Petitioner had made serious allegations that were being investigated, but Templeton never provided Brittan with any details. Templeton did tell her, however, that Petitioner was very emotional and that Brittan should be sensitive to that fact. (Brittan Aff. at ERE 21-22/2-4.)

Petitioner's behavior during and after this meeting was disconcerting. She stated, for example, that she "feared for her life," that "[Schott] had a brother who was a policeman and could take care of things for Gary," and that "if Gary Schott knew what she was doing he would kill her." (ERE 7-9.) After the meeting Petitioner was seen in the corner of the room shaking. (ERE 34.)

Templeton and Hayes reported Petitioner's allegations to Bobby Alexander, Exxon's Controller, who promptly began an investigation of the claims. By memo dated August 28, 1996, Alexander requested that a committee broadly investigate "this specific incident or other similar incidents involving Gary Schott." Alexander gave the investigators "the authority to review all pertinent files, documents, and records," and to "interview any witness that [they] judge to have information necessary to reach closure." Further, he told the committee to "prepare . . . a written report that assesses the legitimacy of the complaint, determines if a policy violation has occurred, and offers recommendations for remedial action." (Alexander Aff. at ERE 2/5-6, ERE 6.)

Petitioner Goes Out on Medical Leave

Petitioner continued to appear inordinately upset and in early September 1996, her supervisor and Jack Hayes of Human Resources told Nurse Lawhorn that Petitioner had been crying and was very emotional. Lawhorn met with her on September 11, 1996 to discuss her situation. (Brittan Aff. at ERE 22/6; Lawhorn Aff. at ERE 28/4, ERE 34.)

When she met with Lawhorn, Petitioner appeared sad and distressed. She said she was "unable to work without crying" and that "she believed she had a problem." Lawhorn advised Petitioner to take medical leave and contact her physician as soon as possible. Two days later, Lawhorn again consulted with Petitioner, who explained that her emotional problem was becoming obvious to her co-workers. It was clear to Lawhorn

that Petitioner was distressed, and she concluded Petitioner should take time off from work and consult with her physician. (Lawhorn Aff. at ERE 28-29/5; Lawhorn Dep. 36-37.) Petitioner was evaluated by her physician (Dr. Comfort), who diagnosed her with "Stress Disorder — Acute" and stated she was disabled and unable to work until October 7, 1996. (Lawhorn Aff. at ERE 29/7.) Petitioner was placed on paid leave during this period. (Pet'r Dep. 70, 593-94.) Petitioner admitted that all of this occurred prior to Exxon's first knowledge of Petitioner's EEOC charge on September 12, 1996. (*See* Petitioner's 5th Circuit Brief at 15.)

While on medical leave, Petitioner came to the Exxon building, asked Bobby Alexander to meet with her, and surreptitiously tape-recorded their conversation. (Pet'r Dep. 517-19, 522.) The investigation into Petitioner's complaints was underway at this point, but it had not yet been completed. Petitioner again brought up her allegations of discrimination. (Alexander Aff. at ERE 3/8-9.) Alexander made it clear that her allegations would be investigated and that Exxon would not tolerate discrimination in any fashion. He wrote down the names of the alleged victims of discrimination, told Petitioner he would personally go look at the rankings, and stated that if Schott had discriminated, "I guarantee you he will be punished." (Pet'r Dep. 552-53; Alexander Transcript R1/871-870.) Alexander's serious consideration of Petitioner's allegations is further demonstrated by the fact that when Alexander had to interrupt their impromptu meeting for a prior commitment, he asked her to wait so that they could continue their conversation. When they reconvened, Alexander made it clear that Petitioner was right to bring these allegations forward, and also made it clear that the Company was investigating her allegations because it was "the right thing to do." (Alexander Aff. at ERE 3-4/10-11, Alexander Supp. Aff. at ERE 10-13/3; Pet'r Dep. 556.)

> You keep thinking we are doing this because we have to — you are going to make us do it. That's

> not the reason we are doing it. We do it because it's the right thing to do. We do it because discrimination is wrong and we will not tolerate it and if someone makes the accusation, we are certainly going to find out whether it's true or not true. Whether you do anything or not we would. I mean, you could make one statement about the office and never say anything else and we would still investigate.

(Alexander Supp. Aff. at ERE 10-11/3.)

As in her earlier meeting with Templeton and Hayes, Petitioner made certain comments to Alexander that approached the bizarre. First, she reiterated her belief that her life was in danger. She brought up the issue of Schott's brother again, only this time she stated that, because his brother, a policeman, had actually offered to *help* Petitioner with a problem related to her mother, Schott might take some physical action *toward* Petitioner if her allegations got him into trouble. She also told Alexander that she believed her telephone line had been bugged, that she had been followed in the park, and that Exxon was behind this conduct. (Pet'r Dep. 543-44, 762-63; Alexander Aff. at ERE 4/12; Alexander Transcript R1/873-863; *see also* Pet'r Dep. 767-68 (stating Petitioner's belief that Exxon might have been poisoning her water or her air).)

Finally, Petitioner told Alexander that she was not happy working in her current assignment, whereupon Alexander (like Middlebrooks, Templeton, and Hayes before him) offered to transfer her to another section of the company, or even another affiliate, if she so desired. (Pet'r Dep. 510-11; Alexander Aff. at ERE 4/13.)[6]

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6. Both before and after Petitioner brought forward her allegations, no fewer than seven individuals offered to transfer her to another position. (Opinion at 17a.) She declined all but one of those offers, and later declined even the one offer she originally had accepted. (R4/342, fn.6.)

Petitioner Extends Her Leave, Then Returns

On the date Dr. Comfort said Petitioner could return to work, Lawhorn received a recommendation from another physician, Dr. Peake, who diagnosed Petitioner with "Major Depressive Disorder — Single Episode." Dr. Peake stated that Petitioner would be unable to work for another two to four weeks. On October 27, 1996, Dr. Peake cleared Petitioner to return to work *with no restrictions*, and she did, in fact, return. (Pet'r Dep. 594, 805-07; Lawhorn Aff. at ERE 30/9.) Both Drs. Comfort and Peak were personal physicians chosen by Petitioner. (Pet'r Dep. 22-23, 499, 593; Opinion at 5a, n.2.)

On October 18, 1996, the committee investigating Petitioner's complaints submitted its report to Alexander. The investigation team had interviewed other supervisors under Schott in an attempt to verify Petitioner's claims that he inappropriately ranked minorities and made racial comments. The team also interviewed Templeton and Schott regarding Petitioner's transfer to UFS. The investigation concluded that Schott had not discriminated against minorities in his section and that Templeton's decision to move Petitioner to UFS was neither retaliatory nor a demotion. The report did note, however, that the average ranking of minorities in Schott's section appeared relatively low, and suggested some ways to identify other problems that might have caused this to occur. (Alexander Aff. at ERE 2-3/7; *see also* E-MSJ, Ex. 2E.)

Petitioner Meets with Templeton Again

In December 1996, Petitioner went back to Sheila Templeton's office to discuss her allegations against Schott. She asked Templeton about the results of the investigation, and inquired again about the reasons for her transfer to UFS a year earlier. Templeton invited Jack Hayes to join them, and he advised Petitioner that the investigation was complete, that recommendations were made, and that action had been taken. Templeton then explained, as she had several times previously,

the reasons Petitioner had been transferred to UFS. (Pet'r Dep. 562-63, 595-605; Templeton Aff. at ERE 19-20/18; Hayes Aff. ¶ 9 at E-MSJ, Ex. 6.)

Petitioner complained again about her UFS job, stating that she was having to work weekends and was making errors. At the same time, Petitioner claimed the job was so easy a high school student could do it. (Pet'r Dep. 600-01.) Hayes and Templeton repeatedly asked Petitioner if she wanted to be transferred to a different assignment, and finally Petitioner agreed. However, when the new job was offered to her, she turned it down. (Pet'r Dep. 424-25, 434, 583-84, 602-03; Templeton Dep. 194-96; Templeton Aff. at ERE 19-20/18; Hayes Aff. ¶ 9 at E-MSJ, Ex. 6.)

Petitioner Receives Counseling About Performance Issues

On several occasions during 1997, Peggy Brittan counseled Petitioner for work-related problems, which included errors in her work, problems with her co-workers and missed deadlines. (Pet'r Dep. 697-98; Brittan Aff. at ERE 23/10.)[7] In February 1997, for example, Brittan and her boss met with Petitioner to discuss errors she had been making. They also discussed with her a co-worker's (Jane Beaty) allegations that Petitioner had inappropriately confronted her in the elevator.[8] On July 31, 1997,

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7. Prior to initiating these counseling sessions with Petitioner, Brittan first checked with the Medical Department to be sure there were no medical reasons *not* to counsel Petitioner. Since Petitioner's own doctor had cleared her to work with *no restrictions*, Brittan was instructed that there was no reason to refrain from appropriate counseling. (Brittan Aff. at ERE 23/10.)

8. Although Petitioner denied having any such confrontation with Beaty, she admitted in her deposition that she had lied about this. (Pet'r Dep. 646-48, 704-05.) Ms. Beaty, like Petitioner, had been an RAE supervisor under Schott. When Petitioner declined the first UFS transfer, Beaty was required to take the job. This is the same Jane Beaty whom Petitioner had accused of having an inappropriate personal

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when Brittan was attempting to counsel Petitioner about a deadline she had missed, she became very emotional, told Brittan that being at work was a problem for her, that no one had tried to help her, that she was only sleeping two hours per night, and that "Exxon is killing me." (Pet'r Dep. 798-800; Brittan Aff. at ERE 24-25/13.)

Petitioner Goes on Second Medical Leave for "Major Depressive Disorder"

In light of Petitioner's emotional state at their July 31st meeting, Brittan again contacted Lawhorn. Lawhorn responded that she was also concerned about Petitioner's health and wanted Petitioner to be examined by a physician. Although Lawhorn offered to refer Petitioner to an independent physician, Petitioner refused to be seen by anyone but her personal physician. (Pet'r Dep. 492-93.) Petitioner showed up at the Medical Department the following day (August 5, 1997) and was clearly distraught. She appeared "tense" and her "facial expression [was] one of agony and hopelessness." Lawhorn advised Petitioner to continue with her psychiatric care, and placed her on paid medical leave until she could be evaluated by her own physician. (Pet'r Dep. 498-500, 808-09; Brittan Aff. at ERE 25/14; Lawhorn Aff. at ERE 30-31/11, ERE 38.)

Lawhorn's determination that Petitioner was unfit for work was confirmed when, a few weeks later, Lawhorn received from Petitioner's psychiatrist a report that Petitioner had a "Major Depressive Disorder," and that she was "totally disabled." Dr. Peake predicted that Petitioner would be unable to return to work until October 15, 1997. (Lawhorn Aff. at ERE 31/12, ERE 38.)

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relationship with Gary Schott. (Pet'r Dep. 270-72.) Petitioner complains about this job even though her supervisor's close personal friend was forced to take it after Petitioner declined.

Petitioner States Desire to Return, then Abruptly Resigns

On October 13, 1997, Petitioner called the Medical Department to find out what forms she needed to complete to return to work. She said that, although she felt unable to return to work at that time, she nonetheless wanted to return to Exxon. When Lawhorn reminded her that she had a return-to-work date of October 15, 1997, Petitioner said she was going to see a new doctor on October 16, 1997. (ERE 39.) That same day, however, Petitioner wrote a note to Lawhorn stating that she wanted to be placed on vacation until the end of the month, and would call Lawhorn to set up an appointment (apparently to discuss her reentry into the workforce). She concluded the note with the statement that "[a]ny position Exxon places me [in] will be fine." (Pet'r Dep. 496-98.)

Despite her expressed desire (as recently as the day before) to return to work at Exxon, on October 16, 1997 (after being on paid leave for over two months), Petitioner came to Exxon's Medical Department and declared her intention to resign. Lawhorn asked her to reconsider, but she said she would deliver her resignation the next day. Jack Hayes, Exxon's Human Resources Advisor, then joined the meeting and both he and Lawhorn repeatedly tried to convince Petitioner not to resign. Hayes even offered again to find her another job if she wanted. Petitioner insisted on resigning, however, and the following day tendered her resignation. (Pet'r Dep. 500-01; Opinion at 18a; Hayes Aff. ¶ 10 at E-MSJ, Ex. 6; Lawhorn Aff. ¶ 14 at E-MSJ, Ex. 7.)

Based on the uncontroverted facts and upon considering extensive briefing, the district court granted Respondent's motion for summary judgment, which was affirmed *per curiam* by the Fifth Circuit after hearing oral argument.

REASONS FOR DENYING THE WRIT

Petitioner presented a remarkably weak retaliation claim, and judgment as a matter of law was the most appropriate judicial response. After a careful review of the record, the district court demonstrated in its opinion that Petitioner failed to establish essential elements of a retaliation case and, in addition, that viewing the evidence most favorably to her, there was no basis upon which reasonable persons could find in her favor.

Specifically, the persons who made the employment decision about which Petitioner complains had no knowledge of her protected conduct, a *sine quo non* of retaliation. Also, there is no evidence of a causal connection between alleged protected conduct and any employment action. Further, Petitioner's primary complaint, her transfer, was away from the supervisor who offended her and to a section she had previously requested. Moreover, on virtually every occasion when Petitioner complained about her job, Respondent's managers offered to transfer her to other jobs, other sections, even other affiliates if that would help. Petitioner testified that these offers continued until the final moment of her employment when Respondent attempted to persuade her not to resign. In short, the uncontroverted facts of this case are totally inconsistent with any theory of retaliation.

The Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (June 12, 2000) does not affect the outcome of the case at bar. *Reeves* held only that a *prima facie* case of discrimination, coupled with proof that the employer's asserted explanation for the challenged action was a pretext, is sufficient to avoid judgment as a matter of law. There was no question in *Reeves* that the plaintiff had made out a *prima facie* case *and* presented compelling evidence that the asserted reason for his discharge was false. 120 S. Ct. at 2104, 2106, 2110. By contrast, in the instant case Petitioner *both* failed to present a *prima facie* case of retaliation *and* failed to present evidence from which reasonable persons could find that the

reasons for the actions complained of were a pretext. Therefore, *Reeves* has no applicability here. Moreover, even if *Reeves* were assumed, *arguendo*, to be applicable, the summary judgment evidence is so overwhelming as to warrant the judgment entered for Respondent. *Reeves*, 120 S. Ct. at 2109.

I. The Holding In Reeves Does Not Affect the Soundness Of The Decision Below

A. Petitioner Extends *Reeves* Beyond its Logical and Legal Boundaries.

Reeves dealt with the narrow question "whether a plaintiff's *prima facie* case of discrimination (as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." 120 S. Ct. at 2104. The Court answered this question in the affirmative, rejecting the so-called "pretext plus" rule insofar as that would have *required* a plaintiff to present in every case not only a *prima facie* case and proof of pretext, but also something beyond these two showings in order to avoid a judgment as a matter of law. *Id.* at 2107. *Reeves*, however, did not alter the *McDonnell Douglas/Burdine* [*Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)] line of discrimination cases (indeed it relied on those cases) and, more importantly, it did not alter the *Celotex/Liberty Lobby* line of cases which imposed upon courts a duty to grant summary judgment where the nonmovant does not present sufficient evidence for a reasonable factfinder to find in its favor on all elements of its case. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Petitioner seeks to draw from this limited holding a rule of decision that would dynamically alter summary judgment jurisprudence. Petitioner claims (Pet. at 5) that "*Reeves* established that, on summary judgment in Title VII cases, lower

courts must credit the employee's evidence establishing a *prima facie* case of discrimination and challenging the employer's 'legitimate, nondiscriminatory reasons' for the alleged adverse employment action." Of course, that is not the law. Rather, *Reeves* continues in effect the requirement that a plaintiff must present "sufficient evidence for a *reasonable* factfinder to reject the employer's nondiscriminatory explanation" in order to avoid a summary adverse ruling. *Reeves*, 120 S. Ct. at 2104 (emphasis added).

Petitioner's interpretation of *Reeves* would eliminate the possibility of summary judgment in virtually all employment cases — under such a rule any jury verdict would be unreviewable on the argument that the jury simply disbelieved the employer. This would be inconsistent with this Court's precedents holding that summary judgments are available in discrimination cases just as in other civil litigation. *Celotex*, 477 U.S. at 327; *Reeves*, 120 S. Ct. at 2106, 2109.[9]

B. *Reeves* Is Inapplicable To This Case.

Unlike *Reeves*, this is not a "pretext plus" case; indeed, it is not even a pretext case. In *Reeves*, the Fifth Circuit had found that there "very well may" have been sufficient evidence "for a reasonable jury [to] have found that the employer's explanation for its employment decision was pretextual." 197 F.3d 688, 693 (5th Cir. 1999). Contrast this to the instant case in which the trial court found no evidence — and indeed no possibility — of pretext, a decision affirmed after oral argument, by the Fifth Circuit. (Opinion (App. A to Pet.) at 13a, 17a-19a, and App. B.)

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9. The contrast between this case and *Reeves* could hardly be more stark. The plaintiff in *Reeves* produced strong evidence of discriminatory animus by the primary decision maker (including offensive statements and demeaning treatment over a period of time), compelling evidence that the employer's reason for the discharge was false, an involuntary termination and a clear *prima facie* case. 120 S. Ct. at 2104, 2106, 2109-10. Petitioner's evidence has *none* of these features.

Petitioner complains about two employment actions: her transfer in 1995 and her resignation (in spite of Respondent's entreaties to her not to resign) in 1997. These two actions occurred under different circumstances and were analyzed in detail by the trial court.

1. *Petitioner's Transfer*

Petitioner's primary claim in this case is that her transfer constituted retaliation by her supervisor, Gary Schott. The trial court found that this claim was untenable because the primary decision makers were unaware of the alleged protected conduct against Schott and therefore could not possibly have acted out of retaliatory animus. (Opinion at 13a.) Petitioner's supervisor did not have the power to effect a transfer; rather, this authority was vested in Ms. Templeton as the manager of the department and as a member of the Personnel Subcommittee. Schott was not a member of the Personnel Subcommittee, did not attend its meetings and could not make any recommendations. It is also clear that the receiving manager, David Middlebrooks, like Ms. Templeton, was totally unaware of Petitioner's alleged protected activity at the time the transfer decision was made.

Against this evidence, Petitioner cites a single reference, taken out of context, to Schott being "jointly" responsible for her transfer. (Pet. at 5.) The trial court noted Schott's tangential (at most) involvement in the transfer and set forth in detail its reasons for concluding that this involvement could not, when considered against the uncontroverted lack of knowledge of the primary decision makers and the Personnel Subcommittee itself, allow reasonable jurors to infer that Schott was somehow responsible for the decision, let alone that it was retaliatory. (Opinion at 2a, 3a, 13a.) Even the document relied upon by Petitioner makes clear that Sheila Templeton was the primary decision maker. Petitioner cites the "jointly" language from the internal EEO report of the investigation of her complaints (Pet. at 5), but fails to note the sentence immediately following:

> Templeton played the primary role in implementing the transfer because she was the department manager & the Operations Accounting representative on the Controller's personnel committee.

(E-MSJ, Ex. 2D at p. 5 (also labeled as production #EJAS-000477).)

Moreover, the district court's determination of no evidence of retaliation or pretext is strongly supported by a number of circumstances surrounding the transfer; namely:

> (1) Petitioner was transferred to a section (UFS) which she testified was seen as desirable and one to which only high potential employees with good performance records are assigned. (Pet'r Dep. 52-53.)
>
> (2) This transfer was to a job at Petitioner's same job level and compensation. (Pet'r Dep. 478.)
>
> (3) Petitioner had requested a transfer to UFS. (Pet'r Dep. 52, 240, 274; Opinion at 11a-12a.) She testified that as of November 1995, "at that point in time I had no dissatisfaction" with the UFS assignment. (Pet'r Dep. 409.)
>
> (4) This transfer took Petitioner totally out of the jurisdiction of her direct superior (Gary Schott) whom she claims was hostile toward her for her opposition to his allegedly discriminatory employment practices.[10] (Pet'r Dep. 87.)
>
> (5) In the evaluation cycle after her transfer, Petitioner continued to enjoy a robust ranking, mostly due to positive

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10. It is difficult to conceive of a set of circumstances in which a level transfer *away* from an offending supervisor could be rationally viewed as an adverse act. Imagine the stridency of Petitioner's complaint had Gary Schott stepped in to prevent the transfer arranged for her by Sheila Templeton and David Middlebrooks.

input from Gary Schott given to the reviewing supervisor after the transfer. (Opinion at fn.1; Pet'r Dep. 375-76, 380-81.) In the performance appraisal given by Schott to Petitioner just before she transferred, he gave her the highest possible rating for a number of major categories of performance including job knowledge, initiative and "supporting equal opportunity/affirmative action."[11] Schott concluded the appraisal by stating that "Jackie is [a] very dedicated and committed employee that always puts Exxon as the number one priority" and he assessed Petitioner as having the potential to be promoted at least three levels. (Pet'r Dep. 393-94.)

(6) Petitioner's primary complaint about the UFS transfer was that the job was not sufficiently challenging for her skills. (*See* Petitioner's Brief at 13, 27.) Yet Petitioner also agrees that she was making errors and not meeting deadlines in this position. (Pet'r Dep. 242, 697-98; Pet'r Aff. R 1/913-912.) Further, the scope of jobs available to Petitioner was constricted by her request that they not involve weekend or significant overtime work because she needed to care for her mother.

(7) When Petitioner finally complained about the transfer after many months, (Pet'r Dep. 434, 563, 573-74), Respondent did *not* compel her to remain in a job in which she was dissatisfied. Rather, Petitioner was offered, on numerous occasions, an opportunity to transfer to various other jobs. She declined these opportunities. (Pet'r Dep. 431-36, 510-11, 583-84, 601-03; Opinion at 17a; R4/343 at fn.4, 342 fn.6.)

(8) In dealing with Petitioner's emotional problems, Respondent was careful to follow the advice of Petitioner's

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11. *See* Ex. A-1 to E-RMSJ. In this category Schott stated about Petitioner, "the units Jackie has supervised the last couple of years have had a high percentage of minority employees. She has always treated her employees with respect and has had a very effective working relationship with them."

own-treating psychiatrists, including granting leave when requested and ordering reinstatement as soon as her physicians stated that she was capable of returning to work. (Opinion at 4a, 5a, n.1, 7a, 18a.)

(9) The *only* reason Petitioner declined the transfer to UFS when it was first offered in June of 1995 was her expressed need to care for her mother. (Pet'r Dep. 132-33, 209.) The transfer was later implemented only after Sheila Templeton and David Middlebrooks located another UFS position that could be performed while accommodating Petitioner's need to care for her mother. (Opinion at 12a; Pet'r Dep. 180-81; Templeton Dep. 86-87, 107-09.)

(10) Transfers to UFS were a routine part of the rotation for accounting supervisors like Petitioner. (Pet'r Dep. 452-53.) When Petitioner turned down the first such transfer offered to her, one of her fellow supervisors was required to take that job. This was Jane Beaty, who Petitioner alleged had a favorable relationship with Gary Schott. (Pet'r Dep. 270-72; Templeton Aff. at ERE 15/7, R1/845.)

(11) When Petitioner offered her resignation, instead of accepting it with alacrity as one would have expected a retaliatory employer to do, Respondent earnestly attempted to dissuade her from resigning and offered again to transfer her to a position she would consider acceptable. (Opinion at 18a; Pet'r Dep. 500-01.)

a. *No Evidence of Pretext in Transfer Decision*

It is clear from the uncontested facts that there is *no indication* that the employer's reason for transferring Petitioner was pretextual, let alone sufficient evidence for reasonable jurors to draw such an inference. Thus, *Reeves* is simply inapplicable to this case.

Where an employee is given a level transfer to a section that they testify is desirable, to a job that is an accommodation to their expressed need not to work overtime, and the primary decision makers are manifestly unaware of their protected conduct,[12] there is no tenable basis on which to ground a finding of pretext. Indeed, on this record even if Templeton and Middlebrooks had known of the protected conduct (which they indisputably did not), there would be no available inference of retaliatory animus or pretext on their part.

b. *No Prima Facie Case*

An additional distinguishing feature of the instant case is that unlike the plaintiff in *Reeves*, Petitioner did not even make out a *prima facie* case. A *prima facie* case of retaliation requires the plaintiff to establish (1) that he engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that there was a causal connection between participation in the protected activity and the adverse employment action. *Shackelford v. Deloitte & Touche, L.L.P.*, 190 F.3d 398, 407-08 (5th Cir. 1999). Petitioner has not challenged this standard either in the fifth circuit or in this Court. This record contains no evidence of a causal connection between Petitioner's opposition to Schott's alleged inappropriate activities and her transfer, and certainly Petitioner has not fulfilled her Rule 56 obligation to produce evidence sufficient for a *reasonable* finder of fact to find in her favor on this essential element of her *prima facie* case.[13]

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12. Petitioner has *never* contended that Templeton or Middlebrooks were aware of her protected conduct when they made the transfer decision, nor could she reasonably do so since she surreptitiously tape-recorded their conversations which furnished independent proof of their lack of such awareness. (*See* Opinion at 2a, 14a.)

13. Giving Petitioner every benefit of the doubt, the district court assumed for purposes of its decision that the level transfer to UFS could be construed as an adverse act. (*See* Opinion at 10a-11a and n.4.) (Cont'd)

Petitioner has adduced no evidence of causation. She points only to her allegations regarding her supervisor which were not made until nine months after her transfer, (Pet'r Dep. 152, 489-90, 508-09, 574-75), and the transfer itself, which was to a section she had previously requested and to a job which accommodated her personal needs. Moreover, Petitioner concedes that the primary decision makers, the transferring and receiving managers (Templeton and Middlebrooks), had no knowledge of her protected activity and that when she finally complained about the new job, she was afforded numerous chances to transfer. These circumstances and others noted in Section II.B.1, *supra* are antithetical to the causation element of a retaliation *prima facie* case.[14]

2. *The Resignation*

Petitioner's second retaliation claim concerns her resignation in October 1997. This claim is even more tenuous than the transfer claim. As noted by the district court, (Opinion at 17a), the claim requires that Petitioner establish that her resignation was in reality a constructive discharge. In order to establish a constructive discharge, an employee must show that

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(Cont'd)
The court went on to note, however, that this presumption in favor of Petitioner was somewhat of an analytical reach. (*Id.*) In view of the undisputed facts of this transfer and particularly the many opportunities afforded Petitioner to move to another job or section of the Company virtually anytime she complained about her job, this transfer cannot reasonably be construed as an adverse act, which constitutes an alternative, independent and sufficient basis for the judgments from which Petitioner appeals. (*See* Respondent's Brief in the Fifth Circuit at 39-45.)

14. Alternatively and independently, the summary judgment record furnishes no potential basis for reasonable jurors to find for Petitioner on her ultimate burden, "whether, 'but for' the protected conduct, the employer would not have engaged in the adverse employment action." *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 372 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 798 (1999).

the employer "made the employee's working conditions so intolerable that a reasonable employee would feel compelled to resign." *Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997). Petitioner does not ask the Court to alter this standard which is consistently applied by the federal circuits. *See* Barbara Lindeman & Paul Grossman, *Employment Discrimination Law* at 838-46 (BNA 3d ed. 1996 & Supp. 1998) (collecting and describing constructive discharge cases from the federal courts of appeal).

This case is the antithesis of a constructive discharge. Rather than showing a company bent on making her working conditions intolerable, the evidence shows that Exxon took her concerns seriously and treated Petitioner with solicitude. For example, once Petitioner decided that the UFS position was not to her liking, no fewer than seven people offered to find her a new job.[15] (Opinion at 17a.) When Petitioner surfaced her claims against Schott, those claims were immediately brought to the attention of both Human Resources and the Controller who promptly launched a full investigation into them. Finally, when Petitioner evinced troubled behavior in the workplace,[16] her managers contacted Exxon's Medical Department for guidance.

15. When the first of these offers was made in May of 1996 by Middlebrooks, Petitioner said, "No, I don't want to go somewhere else." (Pet'r Dep. 228, 240-41.) On another occasion, Petitioner told Templeton, "the job was not the problem." (Pet'r Dep. 602-03.)

16. The district court considered Petitioner's subsidiary complaints, (Opinion at 10a, n.3 and 14a), and found that there was (1) no evidence of any connection to her protected conduct; and (2) no evidence that these uncontroversial events would not have occurred in the absence of any protected conduct. For example, Petitioner cites (Pet. at fn. 24) her February and July 1997 interactions with Brittan in support of her constructive discharge claim. Not only has Petitioner failed to submit any evidence that these events are causally connected to her EEOC charge, but she cannot show that "but for" her charge these counseling sessions would not have occurred. Petitioner testified she had no facts that support her claims that her complaints about Brittan

(Cont'd)

Yet there is even more compelling evidence inimical to a finding that a reasonable person in Petitioner's shoes would have been compelled to resign. When Petitioner met with Templeton and Hayes in December 1996 (upon her return from medical leave), she testified that she was told she was "as respected now as [she was] before," that "no one wants [her] to quit," and that "everybody is glad to have [her] back." (Pet'r Dep. 598-99.) And when Petitioner expressed her intention to leave Exxon, both Jack Hayes and Liz Lawhorn actually asked her repeatedly *not* to resign, and Hayes offered again to find her another position. (Opinion at 18a; Pet'r Dep. 500-01; Lawhorn Aff. at ERE 31/14; Hayes Aff. ¶ 10 at E-MSJ, Ex. 6.) As the district court noted, (Opinion 18a-19a), such conduct does not constitute constructive discharge as a matter of law.

Even if Petitioner could somehow establish a constructive discharge, she would still be required to submit some evidence of a causal connection as part of her *prima facie* case and, upon the employer's articulation of a nonretaliatory reason for its action (here: "she resigned even though we begged her not to"), evidence of "but for" causation. *See Shackelford*, 190 F.3d at 403. Petitioner points to a conversation with Bobby Alexander some thirteen months prior to her resignation, one of about fifty conversations Petitioner surreptitiously tape-recorded. The district court analyzed this conversation in detail, (Opinion at 14a-17a), and found that it yielded no inference in support of Petitioner's claims. It also found that, in any event, Alexander did not make the decisions of which Petitioner complains. (Opinion at 16a-17a.) In fact, Petitioner spoke to Alexander a total of one time, over a year before her decision to resign. Note

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(Cont'd)
related to her charge. (Pet'r Dep. 491-92.) Furthermore, Petitioner admits she is speculating as to Brittan's motivation in having these counseling sessions. (*Id.* 698.) It is clear though that Petitioner agrees she was making mistakes in her job and that Brittan was concerned about her well-being when she insisted Petitioner not leave until she calmed down. (*Id.* 697-98, 799-800.)

also the incident with Gary Schott (*i.e.*, Petitioner's opposition to his alleged discrimination) occurred some two and one-half years before her resignation and that the resignation occurred approximately two years after her transfer away from Schott.

As so often happens when a conversation is secretly recorded, it is possible for the recorder to lead the other participant, and Petitioner quotes (Pet. at 8-9) some of the resulting material out of context. (*See* Alexander Transcript at R. 1/873-862.) For example, Petitioner quotes Alexander using the phrase "screwing your career up," (Pet. at 8), and conveniently leaves out the immediately previous remark where Petitioner first introduced this phrase:

> Petitioner: I just didn't want to ruin my career. And it's already screwed up, what little of it I have.
>
> Bobby Alexander: If, if you would trust me and listen to me, your career would not be screwed up. Now I'll be the first to admit I think you're screwing your career up. But it's not too late to stop it and turn it around.

(R. 1/869.) Further, during the course of this lengthy conversation, Alexander emphasized that Petitioner's allegations would be investigated thoroughly and that he would see to that personally. (*Id.* at 872, 871, 869, 866, 863.) Alexander did just that, chartering an investigation with the full authority of his office. He stated to Petitioner at this meeting:

> I guarantee you, you give me the name of the twelve people you think were discriminated against, I guarantee you I will personally look into it. We will not tolerate discrimination against anyone for any reason.

(*Id* at 872.)

> . . . [W]e are interested in helping you. And I sincerely mean that. I do not think we have discriminated against anybody. But if you give the

> names of the twelve people I will personally look into it and personally report back to you as to what I found.

(*Id.* at 871.)

No reasonable employee would feel compelled to resign after this conversation, and indeed, Petitioner did not do so for over a year.[17] Petitioner also complains, (Pet. at 10-11), about a comment Alexander made to Templeton (approximately year-end 1996) to the effect that leaving UFS early might leave a "mark" on her career. Petitioner never linked this comment to her resignation many months later and, other than her speculation, offered no evidence of any relationship to protected activity.[18] The legal principles incident to Petitioner's claim of

17. Interestingly, Petitioner never complained about Alexander to the EEOC, even though she filed an amendment to her charge shortly after her meeting with him. In her amended charge, she complained about retaliation by Ernest Terry, an African-American attorney at Exxon, and Middlebrooks. She testified that she was erring on the side of completeness in filing the amendment, (Pet'r Dep. 108-09, 267-68, 468-69), but it makes no reference to the conversation with Alexander. (*See* Ex. 8 to E-MSJ.)

18. Petitioner complains, (Pet. at 10-11), that the district court inappropriately evaluated this statement as a reasonable opinion about corporate perception rather than a threat. It should first be noted that Alexander himself never made this statement to Petitioner but rather expressed his concern to Templeton that although he personally understood Petitioner's leaving UFS early, it might be perceived by some other manager as leaving without proving she could be competitive. (Templeton Dep. 212-13.) Second, Petitioner testified that she declined the transfer in part because she was becoming more comfortable in the USF job ("I had finally gotten my feet on the ground") (Pet'r Dep. 425). Third, this alleged threat had nothing to do with Petitioner's rejection of the many other transfers offered to her. Fourth, this incident occurred almost a year before her resignation. Fifth, there was no evidence of any causal connection between this stray cautionary remark and any protected activity. Finally, the remark reflected nothing

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constructive discharge do not implicate the holding in *Reeves* which involved an *actual* discharge and judicial findings of both a *prima facie* case and strong evidence of pretext.

II. Other Reasons For Denying The Writ

A. The Just and Right Application of Rule 56

This Court's precedents teach that summary judgment "is properly regarded not as a disfavored procedural shortcut," but, rather, is an important right both to litigants and to the courts. *Celotex Corp. v. Catrett*, 477 U.S. at 327. Further, *Anderson v. Liberty Lobby* holds that the evaluation of summary judgment evidence should be viewed through the "prism" of the allegations made and the applicable burden of proof. 477 U.S. at 254.

In this case all of the available evidence supports the district court's decision. The judgment below is based predominantly on Petitioner's own testimony and on the circumstances surrounding her account. As against this, Petitioner submits nothing other than conjecture and suspicion. Petitioner's unusual perceptions of victimization should be presumed for purposes of summary judgment to be in good faith; however, they are not competent summary judgment evidence, nor could reasonable persons find in them any support for Petitioner's claims.

Further, the critical conclusions about which Petitioner complains are taken from her own testimony. The eleven items discussed in Section I.B.1, *supra* do not reflect disputed fact determinations or opinions on credibility in any sense. Rather,

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more than the view of an Exxon manager that Petitioner had the skills to succeed at the UFS position and then to continue in the next normal job rotation. (Templeton Dep. 203-04, 212-13; Opinion at fn. 1, noting that Petitioner's performance ranking remained at its previous satisfactory level throughout her tenure; Alexander Supp. Aff. at E-RMSJ, Ex. G, ¶ 6.)

these dispositive items are *based primarily on Petitioner's deposition testimony*, and therefore, Petitioner's argument that the district court "rel[ied] almost exclusively on controverted Affidavits," (Pet. at 6-7), is nonsense. These items include, notably, that Sheila Templeton and David Middlebrooks had no knowledge of Petitioner's protected conduct, that Petitioner had requested a transfer to UFS, that Petitioner was offered other jobs when she complained, and that Petitioner was urged not to resign. Thus, the district court did not weigh and balance countervailing[19] evidence, but merely noted the uncontroverted facts (or those established as a matter of law under *Celotex*) in support of its legal conclusions.

B. Other Considerations Indicated by *Reeves*

As the Court noted in *Reeves*:

> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, [and] the probative value of the proof that the employer's explanation is false. . . .

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19. For example, Petitioner complains, (Pet. at 7), of the district court's finding that various managers "acted out of concern for Sanders' emotional health and — most importantly — upon the orders of Sanders' physicians." Yet it is undisputed that Petitioner's physicians, not Exxon company doctors, diagnosed Petitioner as having significant emotional problems and recommended that she be excused from work during periods of treatment, recommendations that Exxon scrupulously followed. (Pet'r Dep. 67-70, 593-94.) The physicians' recommendations are in the record, (*see* ERE 11, 12, 14), and Petitioner's deposition testimony confirms both the fact and the wisdom of those recommendations. (*See* Pet'r Dep. 594, 677.) Similarly, the district court findings Petitioner complains of in footnote 23 (dealing with the meeting with Peggy Brittan) are specifically supported in Petitioner's deposition. (Pet'r Dep. 491-92, 698, 798-800; Pet'r Aff. ¶¶ 52-54 at R1/912.)

120 S. Ct. at 2109. Both of these factors strongly support the judgment below. First, the "strength of plaintiff's *prima facie* case" is nonexistent. Petitioner's theory of the case is breathtakingly improbable, requiring an assumption that persons not implicated by her allegations and without knowledge of her protected conduct engaged in a highly unlikely conspiracy against her. Petitioner's theory also requires that the multitude of evidence of employment decisions that were routine, completely explained on grounds unrelated to any protected conduct and which, in several critical instances, appear to have been *favorable* to Petitioner, were part of a malevolent plot to harm her. Petitioner is, of course, entitled to advance any scenario or theory of the case no matter how improbable;[20] however, she must offer some evidence to survive a proper Rule 56 motion. In this case she has offered nothing but speculation and suspicion ungrounded in any evidence from which reasonable persons could find that the employer's reasons for the two decisions at issue (the transfer and the resignation) were a pretext for retaliation. Thus, this second *Reeves* factor ("the probative value of the proof that the employer's explanation is false") also strongly supports the district court's careful opinion, as well as the Fifth Circuit's affirmance after oral argument.

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20. *But see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596 (1986) where the Court relied, at least in part, on the plaintiff's relatively implausible theory of the case in evaluating "ambiguous evidence" and holding that the defendants were entitled to a judgment under Rule 56. This theme was expanded and further explained in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986): "[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden" and "must bear in mind the actual quantum and quality of proof necessary to support liability." Where the substantive evidentiary burden is proof of pretext, and the plaintiff's theory of pretext is wildly improbable and speculative, the "reasonable fact finder" requirements of *Matsushita*, *Liberty Lobby*, and *Reeves* imply a closer scrutiny of the non-movant's evidence.

C. Effect of Petitioner's Theory on Other Cases

As noted in Section II.A., *supra*, if Petitioner's theory of *Reeves* is upheld, it would effectively end summary judgments in virtually all employment cases. If the extraordinarily tenuous showing made by Petitioner in this case is sufficient to withstand a judgment as a matter of law, it would discourage district courts from applying the careful Rule 56 analysis performed in this case. This will result in the trial of many cases which are simply not litigation-worthy and, more importantly, will discourage trial and appellate judges from distinguishing potentially meritorious claims from others. This in turn would undercut the credibility of the employment discrimination laws which are a critical part of modern employment policy.

CONCLUSION

The record below reflects a group of managers who were appropriately sympathetic to a troubled employee, who attempted to respond to her concerns of various sorts whenever they were expressed, and who dealt with an extremely difficult situation to the best of their ability. The summary judgment granted by the district court was not only correct as a matter of law, but under the circumstances of this case is a healthy precedent, for other companies should be encouraged to conduct themselves as positively and constructively as Respondent did in this case.

Finally, in view of all of the evidence presented in this case, the result sought by Petitioner will be of no benefit to her either, for it will merely prolong the inevitable. As various commentators have noted, one of the purposes of Rule 56 is to provide a "merciful end" to meritless litigation.[21] This case cries out for a merciful end. The petition for writ of certiorari should be denied.

Respectfully submitted,

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21. *See, e.g., Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986), *cited with approval in Celotex Corp. v. Catrett*, 477 U.S. 317, 319, n.1 (1986).